

# Employment Law Update 2025

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# Resources

- ▶ Employer Hotline  
1-800-832-9394
- ▶ E-mail: [employerinfo@twc.texas.gov](mailto:employerinfo@twc.texas.gov)

# Independent Contractors

# Independent Contractors

- ▶ Misclassification of Workers
- ▶ Independent Contractor Tests
- ▶ How can misclassification arise?

# Misclassification of Workers

## **Some key aspects of classification:**

- Default is that worker is an employee
- Employer must show otherwise
- Contract Labor = Temp. Staffing Firm or workers from a labor agent
- Classification is dealt with on a case-by-case basis

# Misclassification of Workers

When in doubt, think about this:

An independent contractor is effectively a **self-employed independent business entity** who is in a position to make a profit or loss based upon how he or she manages their own **independent enterprise** while fulfilling the **contract**.



# Independent Contractor Tests

- ▶ DOL Test
- ▶ IRS Test
- ▶ TWC Test



# Independent Contractor Tests

## DOL: Economic Realities

- ▶ **Employee or Independent Contractor Classification Under the Fair Labor Standards Act**
- ▶ **89 FR 1638 (January 10, 2024) (Effective: March 11, 2024)**
  1. Opportunity for profit or loss depending on managerial skill
  2. Investments by the worker and the potential employer
  3. Degree of permanence of the work relationship
  4. Nature and degree of control
  5. Extent to which the work performed is an integral part of the potential employer's business
  6. Skill and initiative
  7. Additional factors

# Independent Contractor Tests

## The IRS Test

- ▶ IRS has a test organized in 3 categories:
  - ▶ Behavioral Control
  - ▶ Financial Control
  - ▶ Type of Relationship  
(between parties)

# Independent Contractor Tests

## TWC Direction/Control Test

- ▶ Broadly inclusive and used in ‘common law’
- ▶ Since presumption is that worker is employee, the employer must demonstrate that:  
“...the individual’s performance of the service has been and will continue to be **free from control or direction** under the contract and **in fact**”







# How Can Misclassification Arise?

- ▶ Red Flags
- ▶ Audits

# How Can Misclassification Arise?

## Red Flags In Classification

- ▶ ‘1099 employees’ or ‘contract labor’
- ▶ Having contractors fill out job applications
- ▶ Having contractors wear company badges and uniforms or carry company business cards
- ▶ Giving contractors a company e-mail address

# How Can Misclassification Arise?

## How Do Audits Get Started?

A TWC audit can originate in several different ways, including:

- ▶ Worker Files a UI Claim and gets denied
- ▶ Someone Reports You to TWC
- ▶ Random TWC Audit
- ▶ Geographic or Industry based Audit



# Policy Handbooks

# Policy Handbooks

- ▶ Format
- ▶ Enforcement
- ▶ Other Considerations

# Format

- ▶ Explanation of Policy
- ▶ Examples
- ▶ Consequences

# Format

## Explanation of Policy

- Your opportunity to make a blueprint
- Say what you mean and mean what you say
- Convey your rule/policy to your workers

# Format

## Provide Examples

- Be specific
- What is allowed? What Is not?
- Do not assume

# Format

## Consequences

- A good policy will also include consequences for violations
- Zero-tolerance? Three-strikes and you're out? Something else?
- Other elements?

# SAMPLE POLICY FORMAT

## Smoking Policy

The company maintains a smoke and tobacco-free office. **No smoking or other use of tobacco or similar products (including but not limited to cigarettes, pipes, cigars, snuff, or chewing tobacco) is permitted at any point during a workday, while on company business, while in transit between work locations or assignments, while at client locations, in any part of a company building or within “x” feet of such buildings, or anywhere on or in company parking areas.** There are no designated smoking areas inside or on Company premises, nor does the Company allow smoking breaks during the workday, i.e., no additional breaks beyond those allowed under the Company’s break policy may be taken for the purpose of using tobacco or similar products. If returning from a meal break during which you have used tobacco or similar products, do not leave cigarette butts or other traces of litter or tobacco use on the ground or anywhere else. Dispose of any litter properly in the receptacles provided for that purpose.

Employees may not have the smell of tobacco smoke about their persons during work hours or while on company business. In general, employees should not use or consume any substance, the effects or traces of which could interfere with the employee’s presentation of a clean and professional appearance to clients and the general public.

Please remember to conform to the smoking or tobacco use policies of our clients when working at a client’s site.

All employees are expected to abide by this policy in all respects while at work, whether on company premises, at a customer’s site, or while in transit between work locations or assignments, as well as while the employee is off duty, if the employee is on company premises or in vehicles owned, leased, or rented by the company. Being permitted to use tobacco or similar products while off duty is a privilege, as long as such use does not interfere with the employee’s work, fitness for duty, or professional appearance. If that privilege is abused, it may be withdrawn altogether. **THIS IS A ZERO-TOLERANCE POLICY. VIOLATION OF THIS POLICY WILL RESULT IN IMMEDIATE TERMINATION OF EMPLOYMENT.**

# Enforcement

- ▶ Investigations
- ▶ Warnings
- ▶ Discipline



# Enforcement

Enforcement is not fun, but it is necessary

Policies lose their teeth if you don't enforce them

Proper enforcement requires:

- 1) Investigating
- 2) Disciplinary Action if policy violation confirmed
- 3) Documenting all relevant information ASAP, while it's fresh

# Enforcement

## Investigations

- Investigate prior to issuing discipline
- Document, document, document
- Question all relevant witnesses, get statements
- Unpaid suspension while investigating? Try to limit such a suspension to 3 days or less if possible (unemployment claims)

# Enforcement

## Discipline

- Employer has flexibility
- Be consistent and uniform
- Avoid exceptions to your policies unless there is an urgent and compelling reason

# Enforcement

## Warnings

- Provide written warnings
- Avoid delays in issuing warnings
- Have two firsthand witnesses present
- Avoid issuing a final warning unless you intend it to be final

# Final Warning

Final means final. Multiple final warnings can be misleading.

Avoid broad language (e.g.: “disciplinary action up to and including termination”)

Determine the scope of the final warning. Does it only apply to the rule that was violated, or to your policy handbook as a whole?

“Further violation of this company policy will result in immediate termination of employment”

*or*

“Further violation *of this or any other* company policy will result in immediate termination of employment.”

Sample Final Warning: <https://efte.twc.texas.gov/discipline.html>

# Other Considerations

- ▶ Changing or Updating Policies
- ▶ Policy Handbook Distribution
- ▶ Laws and Regulations

# Other Considerations

## Changing or Updating Policies

- Good idea to periodically review policies
- Laws and rules change
- Employer has ability to modify policies

# Other Considerations

## Policy Handbook Distribution

- Secret policies are useless
- Allow adequate time for employees to review policies and allow for questions
- Make handbook accessible (i.e., available online, in office)



# Policy Acknowledgement

All employees should sign an acknowledgement form for the handbook.

If policies are updated, employees should sign an updated acknowledgement form.

E-signatures are generally acceptable.

- ▶ Make sure the signature is password protected, and only the employee has that information.

Policy Acknowledgement Sample Form:

[https://efte.twc.texas.gov/acknowledgment\\_of\\_receipt\\_of\\_employee\\_handbook.html](https://efte.twc.texas.gov/acknowledgment_of_receipt_of_employee_handbook.html)

# Other Considerations

## Laws and Regulations

- Various laws and regulations can affect the application of policies
  - Some examples:
    - ADA
    - FMLA (covers Public-sector employers)

# Prohibited Policies

Some policies can violate law. Avoid the following:

- ▶ A policy where employers hold an employee's paycheck until company property is returned;
- ▶ A policy/agreement where the employee waives the right to file a claim with TWC (fine + up to 6 months in jail under §§207.071-74 of the Texas Unemployment Compensation Act)

# Other Considerations for Public-sector Employers

## Personnel Files

- Generally, property of the employer
- However, public employees may request copies of personnel documents via Public Information Act

# Other Considerations for Public-sector Employers

## Workplace Posters

- Texas Whistleblower Act
- Texas Hazard Communication Act
- U.S. DOL Job Service Complaint System
- <https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace>

# Thresholds for Coverage Under Employment-Related Laws

[https://efte.twc.texas.gov/thresholds\\_for\\_coverage.html](https://efte.twc.texas.gov/thresholds_for_coverage.html)

# Unemployment Claims and Appeals

# Unemployment Claims and Appeals

- ▶ Responding to Claim Notices
- ▶ Appealing Claim Determinations
- ▶ Timeliness



# Myths

- ▶ If you quit, you cannot get unemployment benefits.
- ▶ People who were on the job less than 90 days cannot get benefits.
- ▶ People who only worked a couple of days, then separated, cannot get benefits.
- ▶ UI benefits pay claimants what the job used to pay. They replace lost wages.

# Responding to Claim Notices

## Special Note for Reimbursing Employers

- Sec. 205.0125 Tex. Labor Code:  
Exception From Duty to Pay  
Reimbursement

# Responding to Claim Notices

## Tex. Labor Code 205.0125. Exception from Duty to Pay Reimbursement (in part)

(a) Notwithstanding any other provision of this chapter, a reimbursing employer is not liable for paying a reimbursement for benefits paid to an individual, regardless of whether the employer was named as the individual's last work, if the individual's separation from work with the employer resulted from the individual:

(1) being discharged for misconduct; or

(2) voluntarily leaving work without good cause connected with the individual's work.

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# Fired or Quit?

# Fired or Quit?

- ▶ If initiated by the claimant= voluntary separation= quit.
- ▶ If initiated by the employer= involuntary separation= fired.

## If Claimant Quit

- ▶ Voluntary separation- claimant must prove good cause connected with the work for quitting.

# Good cause connected with the work

- ▶ “Such cause, related to the work, as would induce a person who is genuinely interested in retaining work, to nevertheless leave the job.”
- ▶ Examples
  - ▶ ER engaging in criminal act
  - ▶ Not getting paid for work
  - ▶ Health or safety issues
  - ▶ Substantial/ detrimental change to the hiring agreement
  - ▶ Hostile work environment
  - ▶ Reprimand in accusatory or humiliating manner
  - ▶ Pay reduction= 20% or more

## If Claimant Fired For Misconduct

- ▶ Involuntary separation- employer must prove misconduct connected with the work.



- ▶ **IN CASE OF A DISCHARGE, ONLY MISCONDUCT WILL DISQUALIFY A CLAIMANT.**

# Misconduct connected with the work

- ▶ Sec. 201.012. DEFINITION OF MISCONDUCT. (a)  
"Misconduct" means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees.
- (b) The term "misconduct" does not include an act in response to an unconscionable act of an employer or superior.

# Misconduct connected with the work

## ▶ Examples:

- ▶ Not following instructions
- ▶ Violation of a policy or rule
- ▶ Tardiness or attendance
- ▶ Time-card violations
- ▶ Misuse of company property
- ▶ Negligence resulting in loss

# If Claimant Fired for Misconduct

- ▶ Employers need to show:
  - ▶ Clear policies and C aware
  - ▶ Employees treated consistently
  - ▶ Warnings given, including expectations and consequences
  - ▶ Claimant knew job in jeopardy

# If Claimant Fired For Misconduct

## ► What to show (employer)

1. Final incident of misconduct;
2. Close in time to the discharge;

AND

3. Claimant knew or should have known could be fired for that reason.

# Responding to Claim Notices

- ▶ Claim Notices
- ▶ Reviewing Claim Notices
- ▶ Evidence

# Responding to Claim Notices

## Claim Notices

- An employer can receive different types of claim notices
- Some examples:
  - Notice of Application for Unemployment Benefits
  - Request for Work Separation Information
  - Wage Verification Notice
  - Notice of Maximum Potential Chargeback

# Responding to Claim Notices

## Reviewing Claim Notices

- Immediately look for deadline
- Review what the notice is asking for
- Do not assume TWC will know what your position on the claim is



# Responding to Claim Notices

## Evidence

- Submit anything you feel supports your position on the case
  - Some examples:
    - Written Warnings
    - Witness Statements
    - Copies of Policies and Procedures

# Appealing Claim Determinations

- ▶ Reviewing Claim Determinations
- ▶ Appeal Hearings
- ▶ Burden of Proof
- ▶ Evidence

# Appealing Claim Determinations

## Reviewing Claim Determinations

- Essentially, the results of the claim filed
- Is the employer being charged or billed?
- If you disagree, or wish to contest, appeal timely according to the instructions on the document

# Appealing Claim Determinations

## Appeal Hearings

- Hearing packet prior to hearing
- Instructions for registration included
- Read hearing packet carefully, it includes important info, such as:
  - Issues to be discussed during your hearing
  - Instructions on how to submit evidence
  - Date and time for the hearing

# Appealing Claim Determinations

## Burden of Proof

- If Claimant quits, claimant must prove “good cause connected with the work”
- If Claimant is discharged, employer must prove “misconduct connected with the work”
- Must tip the scales of evidence in your favor

# Appealing Claim Determinations

## Evidence

- Firsthand witnesses who directly saw or heard what happened
- Firsthand witnesses present at the final incident
- Have these witnesses available for the appeal hearing

# Appealing Claim Determinations

## Evidence

- Audio/video evidence can be submitted - send it in if you have it
- Photos
- Send in any documentary evidence that supports your position, i.e., final warning, policy, etc.

# Timeliness

- ▶ The Importance of Timeliness
- ▶ Look for Dates
- ▶ Respond Timely
- ▶ Keep Proof of Timely Response



# Timeliness

## The Importance of Timeliness

- Timeliness affects appeal rights
- No good cause exceptions
- Jurisdictional bar

# Timeliness

## Look for Dates

- Look at document carefully
- Response/Appeal deadline will be on the document

# Timeliness

## Respond Timely

- Respond timely according to the instructions on the document
- Do not wait until the last minute
- If one method does not work, try another

# Timeliness

## Keep Proof of Timely Response

- Fax Confirmation Page
- Confirmation Number
- Print or save the confirmation page (online response)

# Helpful Links

Texas Guidebook for Employers  
*Especially for Texas Employers*

<https://efte.twc.texas.gov/>

TWC webpage: Employer Benefit Services

<https://www.twc.texas.gov/employer-resources/ebs>

Texas Business Today

<https://www.twc.texas.gov/data-reports/publications>